Supreme
F I

001421 MAR 13 2001

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

ELIZABETH PHELAN,

Petitioner,

v.

THE LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, DOCTOR CHARLES BOHLEN, CHERYL W. PORTER, JOHN R. KAISER, LARRY ATWELL, DONALD J. BROWN, TOM BAUMAN, and JEAN VONDRAK BROWN, in their individual capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

BERNARD Q. PHELAN*
Attorney at Law
2206 Pioneer Avenue
P.O. Box 1841
Cheyenne, WY 82003-1841
(307) 634-8085

**Counsel of Record*
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 H PP

QUESTION PRESENTED

A community college board of trustees adopted a Code of Ethics by which each member promised to "abide by and uphold majority decisions of the Board." After petitioner publicly uttered a view contrary to the majority regarding a proposed tax increase, the board voted to publicly censure her for unethical conduct.

The question presented in this case is:

Does the First Amendment permit, as a part of robust debate, application of such a code of ethics to punish an elected member of the board for speaking against the majority view if such punishment carries no specific collateral injury other than damage to reputation?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 2

Reasons for Allowing the Writ 6

Conclusion 10

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. United States, 250 U.S. 616 (1919) 7, 9

American Communications Association v. Douds, 339 U.S. 382 (1950) 8

Baird v. State Bar, 401 U.S. 1 (1971) 5

Bond v. Floyd, 385 U.S. 116 (1966) 9

Broderick v. Oklahoma, 413 U.S. 601 (1973) 7

Buckley v. Valeo, 424 U.S. 1 (1976) 7

Bullock v. Carter, 404 U.S. 134 (1972) 8

Connick v. Myers, 461 U.S. 138 (1983).....4, 8

Gabbett v. Ballitt, 377 U.S. 360 (1964) 5

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 5

Laird v. Tatum, 408 U.S. 1 (1972) 5, 8, 10

Lamont v. Postmaster General, 381 U.S. 301 (1965) 6, 7, 10

Meese v. Keene, 481 U.S. 465 (1987) 9

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5, 7, 8

Phelan v. Laramie County Community College Board of Trustees, 235 F.3d 1243 (10th Cir. 2000) 1

Pickering v. Board of Education, 391 U.S. 563 (1968) ...4, 8

TABLE OF AUTHORITIES – Continued

Page

Smith v. Daily Mail Publishing Co., 442 U.S. 97 (1979) 6, 7

Whitney v. California, 274 U.S. 357 (1927) 7, 9

Wieman v. Updegraff, 344 U.S. 183 (1952) 9

Wisconsin v. Constantineau, 400 U.S. 433 (1981) 8

CONSTITUTIONAL PROVISIONS, AMENDMENTS, STATUTES AND ORDINANCES:

First Amendment, Constitution of the United States 4, 5, 6, 7, 9

Fourteenth Amendment, Constitution of the United States 4

28 U.S.C. §1254 1

28 U.S.C. §1331 1

28 U.S.C. §1343(a)(3) 1

42 U.S.C. §1983 ..... 2, 4

Laramie County Community College Board of Trustees Code of Ethics, Section 1530 ..... 2, 6, 9

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000), and appears in the Appendix at p. 1, *infra*.

The Opinion of the United States District Court for the District of Wyoming is unreported and appears in the Appendix beginning at p. 12, *infra*.

JURISDICTION

The Opinion, Order and Judgment of the Tenth Circuit Court of Appeals was entered on the 19th day of December, 2000. There was no petition for rehearing.

This petition is being docketed in this Court within ninety days of the entry of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254. The basis for federal jurisdiction in the first instance was 28 U.S.C. §1331, a civil action arising under the Constitution, laws, or treaties of the United States, and 28 U.S.C. §1343(a)(3), a civil action to redress the deprivation, under color of state law, statute, ordinance, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in pertinent part, provides:

> "Congress shall make no law . . . abridging the freedom of speech. . . . "

Federal law, at 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1530 of the Code of Ethics of Laramie County Community College Board of Trustees provides:

> "[I will] base my personal decision upon all available facts in each situation; to vote my honest conviction in every case, unswayed by partisan bias of any kind; thereafter, *to abide by and uphold the final majority decision of the Board.*" (Emphasis supplied.)

STATEMENT OF THE CASE

Elizabeth Phelan, petitioner, served on the Board of Trustees of Laramie County Community College in Cheyenne, Wyoming, for thirty-two years. During this time, the Board adopted a Code of Ethics which provides: "I

will base my personal decision upon all available facts in each situation; to vote my honest conviction in every case, unswayed by partisan bias of any kind; *thereafter to abide by and uphold the final majority decision of the Board.*" (Emphasis supplied.) Board members also take an oath, upon election, to discharge their duties as trustee "faithfully, honestly, and impartially."

In 1998, the Board discussed funding repair and maintenance needs of the main campus facilities. Two proposals were discussed: a five-mill tax levy on property, or general obligation bonds. The Board, including Mrs. Phelan, voted to submit to the voters the question of whether property owners should be assessed an additional five-mill tax assessment.

Mrs. Phelan changed her mind about the mill levy as the referendum drew near. As a result, she published a single small advertisement in the local newspaper encouraging voters to vote against the mill levy. The ad also identified Mrs. Phelan as a "trustee", supported the election of someone seeking to be a trustee, and stated that the enrollment of the College had declined fifteen percent. (Appendix, p. 4, *infra*.) Despite the ad by Mrs. Phelan, the mill levy passed, although by a narrower margin than desired by the Board. (Appendix, p. 4, *infra*.)

On December 16, 1998, the Board of Trustees voted to impose public censure upon Mrs. Phelan for violating its Code of Ethics. The "censure" condemned Mrs. Phelan's advertisement as "inappropriate" and contrary to a Board member's obligation under the ethics policy to " . . . abide by and uphold the final majority decision of the Board." The Board concluded that Mrs. Phelan, by

publishing her views, had "undermined" the final majority decision of the Board to submit a proposed tax increase to a popular vote and provided false information that enrollment had declined. (Appendix, p. 4, *infra.*)

After unsuccessfully seeking to amend the Code of Ethics to prohibit its future application to abridge the right of Board members to exercise free speech, Mrs. Phelan filed an action in the United States District Court for the District of Wyoming pursuant to 42 U.S.C. §1983 seeking injunctive and declaratory relief and punitive damages. She contended that the Board's public censure of her for unethical conduct punished her for her protected speech by tarnishing her public reputation in violation of her right to freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States. (Appendix, p. 4, *infra.*)

The District Court granted the Board's motion for summary judgment. It held that the balancing tests of *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 147-49 (1983), allowed the Board to publicly censure a Board member who publicly opposed the Board's majority decision because, under the *Pickering/Connick* balancing test, the Board's desire to speak with "one voice" to maintain the appearance of political cohesiveness outweighed the free speech interests of Mrs. Phelan. (Appendix, p. 44, *infra.*)

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed, but rejected the District Court's reliance upon the *Pickering/Connick* balancing test because the *Pickering* line of cases apply only to governmental employees or contractors. (Appendix, pp. 6-7.) Instead,

the Tenth Circuit held that although Petitioner's statements were clearly protected speech, the Board's public censure of Petitioner for unethical conduct did not trigger First Amendment scrutiny because the public censure "did not punish" her for exercising her rights under the freedom of speech clause to the First Amendment. (Appendix, pp. 7-8, *infra*.) Relying solely on examples set forth in *Laird v. Tatum*, 408 U.S. 1, 11 (1972), the Tenth Circuit held that for government action to abridge free speech, it must impose "a specific collateral injury" beyond mere damage to reputation, such as denial of state bar admission, e.g. *Baird v. State Bar*, 401 U.S 1, 5 (1971); loss of employment, e.g. *Keyishian v. Board of Regents*, 385 U.S 589, 592 (1967); or conditioning employment on a vague oath, e.g. *Gabbett v. Ballitt*, 377 U.S. 360, 361 (1964). (Appendix, p. 9, *infra*.)

The Tenth Circuit further held that the "censure," finding Mrs. Phelan to have violated its Code of Ethics requiring her to "abide by and uphold the majority decision of the board," was a part of robust debate and thus a protected expression of opinion by the governing board that carried no penalties or prevented her from performing her duties or her ability to speak in public. (Appendix, p. 9, *infra*.) The Court ruled that the censure condemning Mrs. Phelan for failure to abide by and uphold the final majority decision of the governing board, though causing damage to reputation, was insufficient punishment to trigger First Amendment concerns in the context of "uninhibited" and "robust" debate on public issues, citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). (Appendix, p. 10, *infra*.)

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO REVIEW WHETHER A CODE OF ETHICS REQUIRING ELECTED OFFICIALS TO "ABIDE BY AND UPHOLD" MAJORITY DECISIONS MAY BE APPLIED TO PUNISH DISSENTING PROTECTED SPEECH WHEN SUCH PUNISHMENT CONSISTS SOLELY OF INJURY TO REPUTATION.

This is an important First Amendment case. It concerns whether an elected governing board of a community college district, through the adoption of a code of ethics, may apply such a code to suppress dissenting views of its members under pain of official public censure for unethical conduct. Since the language of Section 1530 of the Respondent's Code of Ethics is advocated, as *amicus curiae*, by the Association of Community College Trustees which claims six-thousand members nationwide, this case has widespread national implications with respect to the free speech rights of elected community college trustees. Moreover, since public bodies, elected and unelected, often adopt a code of ethics for its members, the question of whether such a code may be applied to muzzle or deter dissent has major importance to our Freedom of Speech.

Though this court has held that indirect inhibitions may abridge free speech just as may direct prohibitions, *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan concurring), and that subsequent punishment is just as much an abridgement as prior restraint, *Smith v. Daily Mail Publishing Co.*, 442 U.S. 97, 101 (1979), it has never had occasion to consider whether application of a code of conduct to deter dissent through imposition of damage to reputation alone abridges free speech.

The importance of the First Amendment in our political life cannot be underestimated. It is at the very core of our constitutional values. In our constitutional democratic republic the First Amendment protects the right of citizens, whether elected to public office or not, to express their opinions about matters of public concern. The " . . . freedom to think as you will and to speak as you think are means indispensable to the discovery of political truth." *Whitney v. California,* 274 U.S. 357, 375 (1927), Brandeis J., concurring. The " . . . discovery and spread of political truth" is accomplished through a filtering process afforded by the "market place of ideas," a metaphor first utilized by Mr. Justice Holmes, in dissent, in *Abrams v. United States,* 250 U.S. 616, 630 (1919).

Political speech has been given the highest status in the hierarchy of protected speech. *Buckley v. Valeo,* 424 U.S. 1, 14 (1976). In the "market place of ideas," political speech is to have a minimum of restraint. As expressed in *New York Times v. Sullivan,* 376 U.S 254, 270 (1964), " . . . debate on public issues should be uninhibited, robust and wide open." Government regulation may legitimately prohibit such unprotected speech as defamation, obscenity, incitement, or "fighting words," but only if the regulation is not overbroad, precise and carves out a specific category of unprotected speech. *Broderick v. Oklahoma,* 413 U.S. 601 (1973).

Unlawful suppression of speech occurs when protected speech is subsequently punished as well as when it is restrained prior to utterance. *Smith, supra,* 442 U.S. at 101. Freedom of speech may be abridged by inhibition as well as prohibition. *Lamont v. Postmaster General,* 381 U.S. 301, 309 (1965). "Discouragements" having a "chilling

effect" have the same coercive nature as imprisonment, fines, injunctions or taxes. *American Communications Association v. Douds*, 339 U.S. 382, 402 (1950).

Though the lower court found, under *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Bullock v. Carter*, 404 U.S. 134 (1972), that petitioner's speech was "protected speech" and not subject to the *Pickering/Connick* balancing test, it also found that an official "censure" for unethical conduct for having publicly opposed a proposed tax increase did not trigger First Amendment scrutiny. It concluded that the *ad hominem* censure represented the Board's protected participation in public discussion, thereby contributing to uninhibited, robust debate contemplated by *New York Times v. Sullivan, supra*; and, since the censure was not accompanied by loss of employment, denial of benefits, or other "specific collateral injury," no violation of free speech occurred. (Appendix, p. 9, *infra*.)

This analysis does not consider the deterrent effect of a code of ethics which is regulatory, prescriptive, and compulsory in nature, (see *Laird, supra*, 408 U.S. at p. 11), and which prohibits a board member from publicly opposing a majority position of a governing board under pain of suffering a public "censure" from her elected peers for unethical conduct. This obviously operates to discourage an elected official from expressing her opinion if her speech is a minority view. The Code of Ethics here is a regulatory scheme designed to silence dissent under threat of public sanction imposing a "stigma" of unethical conduct upon one's reputation. This is real injury. One's good name and reputation has been recognized by this Court as having real value. See *Wisconsin v. Constantineau*, 400 U.S. 433, 438 (1981). A government imposed "stigma"

to one's reputation frequently has a drastic effect. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952). Furthermore, as mentioned by the Tenth Circuit, this Court has held that potential damage to reputation is sufficient to establish "standing" to contest a statute requiring an exhibitor to label his speech "political propaganda." *Meese v. Keene*, 481 U.S. 465, 472-477 (1987). (See Appendix, p. 7, n.1.) Yet, in this case, an actual, intentional and official imposition of the stigmatizing label of being "unethical" was held to be insufficient harm to draw scrutiny under the First Amendment. (Appendix, p. 10, *infra*.)

The holding that a censure declaring an elected official to have violated a code of ethics when speaking on a matter of public interest was not an abridgment of speech, since it carried no "specific collateral injury" beyond injury to reputation, is at war with the concept that public officials not only have a right to speak, but a "duty" to speak regarding matters of public concern. See *Bond v. Floyd*, 385 U.S. 116, 127 (1966) and *Whitney, supra*, 274 U.S. at 375 (Brandeis concurring). A public official at any level should not have to fear that a written code of ethics may be applied, as it was here, to impose a stigma upon reputation should one speak publicly opposing the majority's position. Such a threat constitutes a sufficient discouragement to open debate to significantly diminish access to the "market place of ideas" by elected officials so crucial to an open society in a representative democracy. See *Abrams, supra*, Holmes, J., dissenting.

Furthermore, since Section 1530 is a regulation which, as applied, is a direct prohibition which compels a board member to remain silent regarding her dissenting political views under pain of public stigmatization of her

reputation, such a regulatory provision should be invalid as it compels silence regarding political speech to present a false image of political unity and "one voice." (See *Laird, supra,* 408 U.S. at p. 11.) This should be inimical to our First Amendment rights and invalid as a method to discourage exercise of First Amendment rights by elected public officials. See *Lamont v. Postmaster General,* 381 U.S. 301, 309 (1965) (Brennan, J., concurring), *supra.*

CONCLUSION

Should the lower court's ruling stand, there is real danger that public officials everywhere may eventually be held accountable to a code of ethics which requires them to remain silent on public issues or face public censure.

The Court should grant a Writ of Certiorari in this matter to consider a question of major consequence to the freedom of elected representative officials to publicly dissent from the majority.

Respectfully submitted,

BERNARD Q. PHELAN
Attorney at Law
2206 Pioneer Avenue
P. O. Box 1841
Cheyenne, WY 82003-1841
(307) 634-8085

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ELIZABETH PHELAN,

Plaintiff-Appellant,

v.

LARAMIE COUNTY COMMUNITY COLLEGE BOARD OF TRUSTEES; CHARLES BOHLEN; CHERYL W. PORTER; JOHN R. KAISER; LARRY ATWELL; DONALD J. BROWN; TOM E. BAUMAN; JEAN VONDRAK BROWN, in their individual capacity,

Defendants-Appellees.

ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES,

Amicus Curiae.

No. 99-8095

(Dec. 19, 2000)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D. Ct. No. 99-CV-52-J)

Bernard Q. Phelan, Phelan-Watson Law Offices, Cheyenne, Wyoming, for Plaintiff-Appellant.

Henry F. Bailey, Jr. (Wallace L. Stock, with him on the brief), Bailey & Stock, Cheyenne, Wyoming, for Defendants-Appellees.

Ira M. Shepard, Paul M. Heylman, and Trina L. Fairley, Schmeltzer, Aptaker & Shepard, P.C., Washington, DC; John A. Coppede and Michelle Pinkowski, Rothgerber, Johnson & Lyons, LLP, Cheyenne, Wyoming, filed an Amicus Curiae brief on behalf of the Association of Community College Trustees.

Before **SEYMOUR**, Chief Judge, **TACHA**, and **EBEL**, Circuit Judges.

TACHA, Circuit Judge.

Plaintiff Elizabeth Phelan appeals the district court's grant of Defendant's motion for summary judgment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Background

Plaintiff Elizabeth Phelan has served as a member of the Board of Trustees for Laramie County Community

College ("Board") since the college opened in 1968. Claiming a violation of her First Amendment rights, Ms. Phelan sued the Board and each Board member in their individual capacities under 42 U.S.C. § 1983. She sought injunctive and declaratory relief in the district court, arguing the Board abridged her First Amendment rights by censuring her for violating its ethics policy.

In 1980, the Board adopted Policy 1530, its code of ethics. Ms. Phelan voted for the policy in 1980, and again in 1985 and 1994. The code describes the manner in which Board members agree to discharge their duties and responsibilities. The provision at issue provides: "[I will] base my personal decision upon all available facts in each situation; to vote my honest conviction in every case, unswayed by partisan bias of any kind; *thereafter to abide by and uphold the final majority decision of the Board.*" (emphasis added). In addition to adopting the ethics policy, Ms. Phelan also signed a general oath each time she was elected, pledging to discharge her duties as trustee "faithfully, honestly, and impartially."

In August 1998, the Board began discussing how to fund the repair and renovation of main campus facilities. Specifically, the Board explored two approaches to funding the campus renewal plan: a five mill property tax assessment or general obligation bonds. The Board discussed the issues concerning the funding options at an open meeting on August 13, 1998, and again on August 19, 1998, at a published Board meeting during which the Board voted on the renewal plan and appropriate funding. All members of the Board, including Ms. Phelan, voted in favor of the renewal plan and to present the five mill tax assessment to the public for popular vote.

Despite her vote in favor of submitting the five mill tax assessment to the public, Ms. Phelan placed an advertisement in the local newspaper encouraging the public to vote against the measure. The advertisement ran on November 2, 1998, the day before the public vote. Identifying Ms. Phelan in her role as "Trustee," the advertisement supported the election of Richard "Dick" Lennox for trustee, declared college enrollment had declined fifteen percent, and urged voters to vote against the five mill tax assessment. Although the tax assessment passed, it did so by a much narrower margin than Board members expected.

On December 16, 1998, the Board voted to censure Ms. Phelan for violating its ethics policy. In censuring Ms. Phelan, the Board expressed its belief that her conduct in running the newspaper advertisement was contrary to the ethics policy and potentially detrimental to the college. The censure also asked her to discontinue this "inappropriate" behavior. The Board based its censure on the language in the ethics policy that requires trustees "to abide by and uphold the final majority decision of the Board," concluding Ms. Phelan's advertisement sought to undermine the final majority decision of the Board and provided false information to the public by stating enrollment had dropped fifteen percent.

Ms. Phelan later filed a § 1983 suit in federal district court, claiming that the Board's formal censure punished her by tarnishing her public reputation in violation of her free speech rights under the First and Fourteenth Amendments of the United States Constitution. She also sued Charles Bohlen, the college president, asserting he is subject to liability under § 1983 because he conspired

with the Board to deprive her of her constitutional rights. The district court granted the Board's motion for summary judgment. We affirm the district court's result, although we do so based on a different rationale. *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994) ("We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law. . . . "). We construe the complaint as a challenge to the ethics policy as applied (in censuring Ms. Phelan), and we hold the ethics policy does not violate the First Amendment because it did not penalize Ms. Phelan for exercise of her free speech rights.

II. Standard of Review

We review a district court's grant of summary judgment de novo. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ms. Phelan concedes, however, that no genuine issues of material fact are in dispute. When no genuine issue of material fact is in dispute, "we determine whether the district court correctly applied the substantive law." *Simms*, 165 F.3d at 1326.

When First Amendment issues are raised, our review is also de novo. *Lytle v. City of Haysville*, 138 F.3d 857, 862 (10th Cir. 1998) (quoting *Rankin v. McPherson*, 483 U.S.

378, 386 n.9 (1987)). When the First Amendment arguably protects the activity in question, " 'an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Id.*

III. Discussion

The Board contends, and the district court agreed, that we should use the balancing approach established in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), to analyze Ms. Phelan's free speech rights. The *Pickering* approach balances a public *employee's* interest "in commenting upon matters of public concern" with the government's interest in "promoting the efficiency of the public services it performs through its employees." *Id.*; *see also Connick v. Myers*, 461 U.S. 138, 147-49 (1983) (creating clear two-step test); *McEvoy v. Shoemaker*, 882 F.2d 463, 466 (10th Cir. 1989) (defining matter of "public concern"). The Supreme Court has also applied the *Pickering* approach in the context of governmental contractors, concluding the government's relationship with contractors is similar to its relationship with employees because the government exercises contractual power and functions as a public service provider in both contexts. *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996).

The *Pickering* line of cases does not, however, apply to facts like those in the case we consider today. Ms. Phelan is not a governmental employee or contractor; indeed, the Board members and Ms. Phelan occupy the

same positions as elected public officials. Furthermore, this case does not involve the government's exercise of contractual power or its "daily management functions," factors which form the underlying factual basis for judicial deference and the application of the *Pickering* approach in the governmental employee and contractor contexts. *Id.*

Although we hold the *Pickering* approach does not apply, we need not apply an alternative approach to determine whether the Board has violated Ms. Phelan's First Amendment rights because the Board's censure does not trigger First Amendment scrutiny.[1] In order for governmental action to trigger First Amendment scrutiny, it must carry consequences that infringe protected speech.[2] *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) ("As a threshold requirement for the application of the First Amendment, the government action must abridge or restrict protected speech."). The Board's censure does not satisfy this threshold requirement. We therefore hold the Board's censure does not infringe any of Ms. Phelan's free

---

[1] Ms. Phelan alleges that the Board's censure tarnished her public reputation. Although this alleged harm to her reputation is sufficient to establish standing, *Meese v. Keene*, 481 U.S. 465, 472-77 (1987), it is not enough to establish an abridgement of her free speech rights.

[2] Because political speech is entitled to the "broadest protection," Ms. Phelan's speech is clearly protected. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *see also Bullock v. Carter*, 405 U.S. 134, 142-43 (1972) (noting that speech of political candidates affects rights of both candidates and voters); *U.S. West, Inc.*, 182 F.3d at 1232 (acknowledging "speech has two components: a speaker and an audience.").

speech rights because it did not punish her for exercising these rights. Nor does it deter her future speech.

Although the government may not restrict, or infringe, an individual's free speech rights, it may interject its own voice into public discourse. *See Meese v. Keene*, 481 U.S. 465, 480-82 (1987) (stating governmental classification of certain films as "political propaganda" was information to which public was entitled and did not infringe free speech rights of individuals who wished to show the films); *Zilich v. Longo*, 34 F.3d 359, 363-64 (6th Cir. 1994) (holding city council resolution expressing disapproval of a former council member does not violate the First Amendment). The crucial question is whether, in speaking, the government is *compelling* others to espouse or to suppress certain ideas and beliefs. *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (striking down state statute compelling individuals to display state motto on license plates); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding compulsory flag salute and pledge by public school children unconstitutional). In order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is "regulatory, proscriptive, or compulsory in nature." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). The consequence may be an "indirect discouragement," rather than a direct punishment, such as "imprisonment, fines, injunctions or taxes." *Am. Communications Ass'n. v. Douds*, 339 U.S. 382, 402 (1950). A discouragement that is "minimal" and "wholly subjective" does not, however, impermissibly deter the exercise of free speech rights. *United States v. Ramsey*, 431 U.S. 606, 623-24 (1977); *see also Pac. Gas & Elec. Co. v. Pub.*

Utils. Comm'n, 475 U.S. 1, 30 (1986) (Rehnquist, J. dissenting) ("When the potential deterrent effect of a particular state law is remote and speculative, the law simply is not subject to heightened scrutiny.").

Thus, the Supreme Court has held that, although the governmental action may "fall short of a direct prohibition," it must impose a specific collateral injury. *Laird*, 408 U.S. at 11 (citing example cases). Unlike the Board in the case we decide today, the government in the cases discussed by the Court wielded compulsory power that clearly abridged free speech rights. *Id.* Examples of governmentally imposed injuries include: denial of state bar admission, *e.g., Baird v. State Bar*, 401 U.S. 1, 5 (1971); loss of employment, *e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 592 (1967); and the conditioning of employment on a vague oath, *e.g., Baggett v. Bullitt*, 377 U.S. 360, 361 (1964).

Based on the facts of this case, the Board's censure is clearly not a penalty that infringes Ms. Phelan's free speech rights. In censuring Ms. Phelan, Board members sought only to voice their opinion that she violated the ethics policy and to ask that she not engage in similar conduct in the future. Their statement carried no penalties; it did not prevent her from performing her official duties or restrict her opportunities to speak, such as her right to vote as a Board member, her ability to speak before the Board, or her ability to speak to the public. *See Zilich*, 34 F.3d at 364 (holding city council resolution did not violate First Amendment because it was not law and contained no penalty); *see also Peeper v. Callaway County Ambulance Dist.*, 122 F.3d 619, 623 n.4 (8th Cir. 1997) (recognizing that "[l]imitations on an elected official's participation in the proceedings of a public body

. . . affect the official's First Amendment free speech rights").

In short, the Board's actions have not injured Ms. Phelan's free speech rights. *See Laird*, 408 U.S. at 12-13 (noting the requirement that an individual demonstrate injury in order to challenge executive or legislative action). Ms. Phelan argues she has been injured because the Board's actions tarnished her reputation. In the First Amendment context, however, injury to one's reputation is not enough to defeat constitutional interests in furthering "uninhibited, robust" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 279-80 (1964) (holding public official may recover in state libel action only when the alleged libelous statement is false and when statement is made with malice). The Board simply made a statement about Ms. Phelan's failure to follow an ethics policy that she voted for on at least three occasions. She remained free to express her views publicly and to criticize the ethics policy and the Board's censure. *See Meese*, 481 U.S. at 480-81 (noting that disseminators of material labeled as "propaganda" by Congress could "add any further information they think germane to the public's viewing of the materials"). In fact, Ms. Phelan has explicitly stated she would engage in the same actions under similar circumstances in the future.

Furthermore, the oath Ms. Phelan took after elected is a general public service oath, by which Board members pledge to uphold federal and state laws and to "faithfully, honestly, and impartially discharge the duties of

Trustee."[3] An oath restricting an individual's free speech rights would of course be subject to heightened First Amendment scrutiny. *See, e.g., Communist Party v. Whitcomb*, 414 U.S. 441, 449-50 (1974) (holding unconstitutional a state loyalty oath requiring new political parties to swear not to advocate the forceful overthrow of government before being placed on the ballot); *Whitehill v. Elkins*, 389 U.S. 54, 62 (1967) (invalidating oath requiring teachers to swear under penalty of perjury that they are not attempting "one way or another" to overthrow the government by force). But because the oath signed by Ms. Phelan does not contain a penalty, such as perjury, for failure to follow the ethics policy, it also does not restrict her free speech rights.

We therefore AFFIRM the district court's grant of Defendant's motion for summary judgment.

---

[3] The oath is entitled the "Laramie County Community College Oath of Office" and contains the following language: "I, Elizabeth Phelan, do solemnly swear that I will support the Constitution and Laws of the United States, the Constitution and Laws of the State of Wyoming, and that I will faithfully, honestly, and impartially discharge the duties of Trustee of the District Board of Trustees of Laramie County Community College to the best of my ability and understanding, so help me God."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ELIZABETH PHELAN, Plaintiff, v. THE LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, DOCTOR CHARLES BOHLEN, CHERYL W. PORTER, JOHN R. KAISER, LARRY ATWELL, DONALD J. BROWN, TOM BAUMAN and JEAN VONDRAK BROWN, in their individual capacity, Defendants.	)	Docket No. 99-CV-052-J

AMENDED ORDER NUNC PRO TUNC GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 25, 1999)

The defendant's Motion for Summary Judgment, and the plaintiff's opposition thereto, came before the Court for consideration upon the parties' written submissions. The Court, having considered the parties' written submissions, the pleadings of record, the applicable law, and being fully advised in the premises, finds and orders as follows:

Background

Plaintiff Elizabeth Phelan has been an elected member of the Board of Trustees for Laramie County Community College since inception of the College in 1968. She continues to be a trustee to the present date. The President of the College is defendant Bohlen; the other defendants are the remaining elected members of the college's Board of Trustees.

Phelan has sued the College's Board of Trustees and each of the Board members in their individual capacities pursuant to 42 U.S.C. § 1983. She seeks declaratory and injunctive relief to determine whether the Board's censure of plaintiff for unethical conduct abridges her First Amendment constitutional rights. Although she does not seek compensatory damages, she seeks punitive damages from each of the individual defendants to be used to establish an educational fund to study First Amendment issues. She also seeks attorney's fees.

In 1980, the Board of Trustees, including plaintiff, adopted a Code of Ethics, Policy 1530. Trustee Phelan voted for the policy in 1980, and again in 1985 and 1994. The provision provides in part as follows:

> [I will] base my personal decision upon all available facts in each situation; to vote my honest conviction in every case, unswayed by partisan bias of any kind; thereafter to abide by and uphold the final majority decision of the Board.

In August of 1998, one of the major issues facing the Board concerned repair and renovation of the College's physical facilities. A main campus renewal plan proposed renovation, deferred maintenance, technology investment

and utility upgrades. Because there was insufficient funding by the State of Wyoming, the campus renewal plan could only be accomplished through a 5 mil [sic] property tax assessment or general obligation bonds. On August 13, 1998, issues concerning renovation and funding were discussed in an open meeting with the Board of Trustees. On August 19, 1998, a published Board meeting was held for final debate and discussion to vote for or against the main campus renewal plan and appropriate funding for the plan. Plaintiff has testified that she was confused at that meeting whether she was voting for the 5 mill property tax assessment or the bond issue. Notwithstanding her claimed confusion, she voted in favor of the renewal and the 5 mil [sic] plan to be presented to the public on election day in November of 1998.

Plaintiff has alleged that the Board first had tentatively determined that the bond issue method of funding should be proposed to the voters because an optional mill levy would have to be voted upon at each election and the project was expected to cover a period of time longer than a single election period. She alleges that after a private meeting of three Board members at the Antelope Station Restaurant outside of Cheyenne, on the weekend prior to the August 19, 1998 Board meeting, those three Board members decided that, based upon the opinion of the bond counsel, a mill levy would only have to be renewed every other election, making it the most desirable option. Phelan alleges she was notified of this change by other members by telephone and by facsimile. At the August 19, 1998 Board meeting, the proposal was again discussed. Phelan asserts that since the time was

nearing when any proposal could be placed on the general ballot, either mill levy or bond issue, she voted to submit the question of the additional mill levy to the voters.

On November 2, 1998, plaintiff, as a trustee, placed an advertisement in the local newspaper the day before the public vote. This ad stated enrollment at the College was down 15 percent, supported the election of Richard "Dick" Lennox for trustee, and encouraged voters to vote "No" for the 5 mil [sic] property tax assessment. Voters passed the 5 mil [sic] renewal plan during the election, but the proposal passed by a narrower margin than anticipated, although the campaign to pass the 5 mill tax levy was strongly supported by many employed at the College, as well as members of the Board.

On December 16, 1998, Trustee Phelan was censured by the members of the Board of Trustees for violating Policy 1530, the Code of Ethics for Laramie County Community College Trustees. She was censured for placing the November 2, 1998 advertisement in the Cheyenne newspaper, as a trustee, for providing false information to the public and for encouraging voters to vote against the 5 mil [sic] tax, contrary to the majority and unanimous vote of the Board on August 19, 1998. The motion for censure was placed before the Board on December 16, 1998, rather than November 18, 1998, because plaintiff had left the Board meeting in November before the censure could be considered. Phelan alleges that the censure was accomplished with the direction, consent, and advice of the College's president, Dr. Charles Bohlen. Phelan alleges the censure humiliated her and has publicly disparaged her good name and reputation.

On January 19, 1999, Trustee Phelan made a motion to the Board for reconsideration, which was voted down 6-1. Plaintiff was censured for violating Policy 1530, the Code of Ethics that she had approved on several prior occasions. The Board felt Phelan had not abided by and upheld the majority, unanimous decision of the Board and that she had provided false information to the public by stating that enrollment at the College was down 15% when it was not.

Phelan contends that a dispute exists as to how much actual enrollment figures were down. The Board asserts enrollment was down only 4%; figures from the Wyoming Community College Commission indicate enrollment was down 6.6%. Actual enrollment figures were not available. In her deposition, Phelan testified that she came to the conclusion that enrollment was down 15% based upon her own observations regarding the numbers of students in halls and cars in parking lots. She testified that "everyone was talking about it, losing their jobs, and the College didn't have students." She was told by an employee of the College, Ray Seitz, that enrollment was down 15%. She heard people talking. However, it is clear that prior to publishing her advertisement on November 2, 1998, Phelan made no efforts to determine the accuracy of her statement that enrollment was down 15% by either contacting College officials or the Wyoming Community College Commission.

Plaintiff alleges that after the election, the Chairman of the Board, Cheryl Porter, contacted other Board members regarding plaintiff's advertisement and asked them about it. All indicated they were upset by the ad and that they felt their efforts to campaign in favor of the mill levy

had been undermined. The chairman proposed a censure of plaintiff, relying upon the language of Section 1530 of the Code of Ethics. She intended to present the matter for consideration at the November 18, 1998 Board meeting, although it was not included on the board's written agenda for that meeting. The matter was raised at the December meeting, with the censure adopted on a unanimous 6-0 vote, with plaintiff Phelan not voting. Plaintiff states that censure received wide publicity and worked to "trash" her ethical reputation in the local community.

At the January 20, 1999 Board meeting, plaintiff moved to amend the Code of Ethics to make it clear that nothing in that code would be construed by the Board to abridge the right of any member of the Board to exercise his or her right to freedom of speech. This motion was defeated, 6-1.

Plaintiff alleges that the college's president, Dr. Bohlen, fully supported the censure although he did not vote for it since he does not have a vote on the Board. Bohlen believed the ad undermined what the administration was trying to do in passing the tax and that division on the Board caused chaos and hindered his ability to know what direction the administration should take. Plaintiff asserts the Chairman of the Board knew Bohlen had no objection to her proposed censure action and that Bohlen provided the Chairman with information on enrollment.

In her complaint, plaintiff contends that by applying the Code of Ethics, the Board punished plaintiff's exercise of free speech regarding matters of public concern relating to taxation of citizens within the Laramie County

Community College District and the election of a person to fill a Board seat on the community College's Board of Trustees. She also alleges that the individual defendants conspired and agreed to punish her through official state action, the formal censure, in violation of the First and Fourteenth Amendments of the United States Constitution.

The defendants have moved for summary judgment in their favor. Defendants argue the newspaper ad that gave rise to the censure of Phelan by the Board of Trustees was not protected speech because it contained a false fact published with a reckless disregard for the truth. Defendants argue further that the subject matter of the advertisement was a matter of public concern regarding the election of Lennox to the Board of Trustees and the taxation issue, but this was "trumped because of the disruptive effect on the Board." Defendants assert Dr. Bohlen had no involvement in the Censure whatsoever and no obligation or authority to be so involved. He should be dismissed from the action and seeks costs and expenses from plaintiff. Defendants argue that they are entitled to good faith qualified immunity as a matter of law and that the claims should be dismissed as matter of law. They assert that the law regarding an individual's Constitutional rights, as a Board member speaking as a Board member, is not clearly established, and thus, they are entitled to qualified immunity. Defendants assert there was no free speech impingement because the censure had no chilling effect on the plaintiff. Plaintiff has no legal right to punitive damages because the defendants

acted in good faith in censuring her. There was no deprivation of a constitutional privilege and no reckless deprivation of any constitutional privilege.

Plaintiff agrees that, generally, the facts in this case are not in genuine dispute. She contends, however, that the law requires summary judgment to be entered in her favor rather than in favor of the defendants. She argues that her free speech First Amendment rights are clearly established.

Discussion

The November 18, 1998 motion seeking censure of trustee Phelan provides:

> On August 19, the seven trustees, including Trustee Phelan, voted unanimously to support the Campus Renewal plan, including a request for funding from the Laramie County Taxpayers of a five mill levy. After voting in favor of the motion, Trustee Phelan chose not to support the project.
>
> On Monday, November 2, 1998, an advertisement was printed in the Wyoming Tribune-Eagle (paid for by Trustee Phelan) which provided false information (enrollment down 15%) and encouraged voters to vote against the five mill tax. Note: Enrollment is down 4.0%.
>
> This conduct is in clear violation of the Board of Trustees Code of Ethics (see attached). Therefore, I move that the Laramie County College Board of Trustees censure Trustee Phelan for conduct contrary to the Boards [sic] Code of Ethics and potentially detrimental to the College

and request that such inappropriate behavior be discontinued.

Phelan Deposition Ex. 5. No penalties attached to the censure.

A copy of the advertisement placed by Phelan on November 2, 1998 was attached to the motion for censure. The ad provides as follows:

Elizabeth Phelan, Trustee
Supports
Richard "Dick" Lennox
LCCC Board of Trustees

- Current Enrollment Down 15%
- vote "NO" on 5 mill tax

"We need him & his abilities to hold administrators accountable for their actions."
– *Elizabeth Phelan*

Paid for by Elizabeth Phelan

The Code of Ethics for Trustees, Policy Number 1530, provides:

Code of Ethics: As a member of the Board of Trustees of a Community College District, I recognize that:

1. The community has entrusted me with the education of post-high school adults.

2. The public expects my first and greatest concern to be in the best interest of all of the students as well as each and every student without distinction as to who they are or what their background may be.

3. The future welfare of this community, of this State, and of the nation depends in the largest

measure upon the quality of education and training we provide in the Community College to fit the needs of every individual.

4. My fellow Board members and I must take the initiative in providing the people of this district with the facts about their College, to the end that they will readily support our efforts to provide the finest possible instructional program, College staff, and physical facilities.

5. Legally, the authority of this Board is derived from the Statute which controls the organization and operations of the College district and which determines the degree of discretionary power left with the Board of Trustees and the citizens of this district for the exercise of local autonomy.

6. I must never neglect my personal obligation to the citizens of the district and my legal obligation to the State, nor surrender these responsibilities to any other person, group, or organization. I have a moral and civil obligation to the nation which can remain strong and free only so long as higher education in the United States of America is kept free and strong.

In view of the above, I will:

1. Devote time, thought, and study to the duties and responsibilities of a member of a Board of Trustees so that I may render effective and creditable service.

2. Work with my fellow Board members in a spirit of harmony and cooperation in spite of differences of opinion that arise during debate of points at issue.

3. Base my personal decision upon all available facts in each situation; to vote my honest conviction in every case; unswayed by partisan bias of any kind; thereafter to abide by and uphold the final majority decision of the board.

4. Remember at all times that as an individual I have no legal authority outside the meetings of the Board, and to conduct my relationships with the College staff, local citizens, and all communication media on the basis of this fact.

5. Resist every temptation and outside pressure to use my position as a member of the Board of Trustees to benefit either myself or any other individual or agency apart from the total interest of the College.

6. Recognize that it is as important for the Board to understand and evaluate the educational program of the College as it is to plan for the College business operations.

7. Bear in mind that the primary function of the Board is to employ a President and establish the policies by which the College is to be administered, and that the administration of the College and the conduct of College business shall be delegated to the employed President and the President's professional and non-professional staff.

8. Welcome and encourage active cooperation by citizens and the communications media in the district with respect to advice in current College operation, program needs, and proposed future developments.

9. Prepare for and participate in all Board meetings.

10. Keep up to date on changes and trends in Community College education by reading newsletters, journals, and other reference sources and by attending conferences, seminars, and workshops consistent with Board policy.

11. Acknowledge that no member of the Board of Trustees may receive any compensation as a trustee and that all expenses of Board members will be reimbursed when the expenses are authorized by the Board of Trustees.

12. Strive step by step toward ideal conditions for most effective Board services to the district, in a spirit of teamwork and devotion to Community College education as one of the greatest instruments for the preservation and perpetuation of our representative democracy.

Phelan Deposition Exhibit 6.

The defendants acknowledge that the subject matter of Phelan's November 2, 1998 advertisement is a matter of public concern as it relates to the election of Dick Lennox and to taxation. However, defendants assert this is not the reason that Phelan was censured by the Board. Defendants also argue that Phelan's activities had a disruptive effect on the Board charged with the responsibility of governing the College.

The defendants contend that the balancing tests of *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983), and their subsequent progeny, dictate that the Court balance the individual's interest as a citizen in making public comment with the injury or disruptive effect the speech creates or could create upon the interest

of the governmental entity, in this case, the Board of Trustees, in promoting the efficient functioning of its operation. The factors that should be considered include the need for a close and personal relationship between the individuals involved and whether that relationship calls for some loyalty and confidence; whether the speech impedes the performance of the speaker's duties or interferes with the regular operation of the individuals involved; lack of harmony which interferes with the efficient functioning of the operation; whether speech hampers communication between the individuals involved; whether the speech produces an atmosphere of mistrust; whether the speech misrepresents the facts; and whether the speech discourages people from coming to work or undermines the authority of management.

The defendants assert that Policy 1530 of the Code of Ethics exists to encourage harmony, good working relationships, loyalty and confidence within the Board, to produce an atmosphere of trust, and encourage communication to accomplish the goals of the institution, once the majority vote is taken after full debate on any issue. Defendants contend that if the majority vote is not given support by the Board members, the ability of the entire Board to accomplish its goals will be impeded.

Defendants contend that Phelan, as a Board member, used her authority and position as a trustee to influence the public to vote contrary to the Board's unanimous decision. She also provided the public with a false fact. Defendants argue that the obligation of the Board member to engage in vigorous debate is part and parcel of the Board member's responsibilities as a Board member. The Board meeting is the proper forum for the Board member

to express himself or herself. Defendants argue that Phelan had every opportunity to express herself regarding the Campus Renewal Plan and funding for the plan prior to the Board's final vote. Defendants argue Phelan knew of the board's "once-voice" policy and contends that she has the obligation to support the majority vote. Phelan, as a Board member, spoke out against the majority and provided false information to the public. She acted contrary to the Code of Ethics and contrary to the policies of the Board of Trustees. Her conduct is disruptive and undermines and creates confusion for those required to follow direction of the Board, such as the College's president. The plaintiff's disruptive conduct harmed the institution and disrupted Board leadership. The speech injures relationships with the Board, impedes the Board's ability to do its job, creates distrust and destroys harmony, cuts off communication, discourages Board members from doing their jobs, and undermines the efforts of the Board in their leadership for the College.

Phelan counters by stating that Policy 1530 deters those who disagree with the majority of the Board and might choose to publish their views to others. She contends that the policy is not a permissible restriction on speech, that the defendants are not entitled to good faith qualified immunity, and that there is evidence that defendant Bohlen acted as a co-conspirator with the other defendants and that he is therefore jointly liable. Plaintiff asserts that there is evidence showing that the defendants acted willfully and with malice, entitling her to an award of punitive damages.

Plaintiff relies in support of her position on the grand principles enunciated by the Supreme Court regarding

First Amendment issues over many years. She argues that the advertisement she published is not subject to restriction, that she should not have been censured by her fellow Board members, because her paid advertisement was political speech permitted in the context of robust and wide open debate on public issues in the marketplace of ideas. She contends that the Board's interest in suppressing her expression is unrelated to any legitimate governmental interest that would permit such restrictions on her speech. Generally, she argues that Policy 1530 is unconstitutionally overbroad and fails to carve out with precision a class of speech which can be regulated or prohibited. She contends that a Code of Ethics which suppresses all minority views by exacting enforced silence from dissenters is facially unconstitutional. Her views, as embodied in her paid political advertisement, were within the breathing space afforded robust political debate.

Plaintiff argues that the *Pickering/Connick* balancing test relied upon by defendants is not applicable to a case not involving an employee of a public institution. She also disputes that the defendants are entitled to good faith immunity, arguing that the right to speak on political or public policy matters by a public official is clearly established.

None of the parties in this case have presented clear, persuasive authority on this issue. Most of the authority reviewed by this Court in its own independent research, and that authority cited by the parties, concerns the ability of the governmental entity to restrict the speech of an employee. Plaintiff cites *Westbrook v. Teton County School*

District No. 1, 918 F. Supp. 1475 (D. Wyo. 1996), in support of her position. *Westbrook* involved a special education teacher who had been disciplined, pursuant to the school district's staff conduct policy limiting and restricting criticism among and between employees of the district, and providing that violation of the policy could result in disciplinary action. Westbrook challenged the school district policy as a constitutionally infirm prior restraint on First Amendment free speech. This position was rejected by the district court, who noted that (1) the policy did not require employees to apply for permission before criticizing colleagues or superiors, (2) did not authorize the district to examine the content of employee's proposed speech before determining whether they can speak, (3) employees did not have to wait approval before speaking, (4) the policy did not require the district to examine pre-speech facts, exercise its judgment and decide whether the [sic] allow or prohibit proposed speech. Accordingly, the plaintiff's prior restraint argument was rejected.

The district court also analyzed the Westbrook arguments in view of the compelling interest and *Pickering/Connick* balancing tests. These two tests are described in that opinion as follows:

> A. The Compelling State Interest Test
>
> When government restricts, on the basis of content, the free speech rights of private citizens, it usually must demonstrate that: (1) it has a compelling state interest in promoting some interest served by the speech restriction; (2) the law restricting speech directly furthers the government's interest; and (3) the law restricting

speech is no more broad than necessary to further the government's interest. . . . "This is," the Supreme Court recently observed, "an exacting test." . . . Thus, if this were a case in which the government had enacted a law that allowed one citizen to "criticize" another citizen only under limited circumstances, the Court would rigorously require the government to satisfy these three criteria. This is not, however, such a case.

The issue here is whether Teton County can regulate the speech of its employees, not whether it can regulate the speech of private citizens. The First Amendment test for evaluating restrictions on the speech of private citizens is different from the test for evaluating restrictions on the speech of public employees . . . Although the First Amendment protects the speech rights of public employees, the protection is not so stout that it requires the government to proffer a compelling interest which justifies a narrowly tailored restriction on such speech.

B. The *Pickering* Balancing Test

In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court set forth the First Amendment test that applies to the speech of public employees. Noting that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," the Court held that:

> The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting

> upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

. . . Over the years, the Court has refined this balancing test, . . . so that it now requires courts to consider first whether the speech at issue addresses a matter of "public concern." . . . If the employee's speech does not address an issue of the public concern, the Court does not even proceed to the next step, which is the balancing. . . .

1. Speech On Matters of "Public Concern"

Addressing the "public concern" requirement in *Connick*, the Court commented that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." . . . Employee speech addresses matters of public concern if, considering its entire "content, form, and context," it relates "to any matter of political, social, or other concern to the community." . . .

* * *

2. Balancing the *Pickering* Factors

If the Court finds as a threshold matter that Westbrook's speech addresses matter of public concern, it will then perform the *Pickering* balancing test. . . . This test weighs the interest of the public employee, as a citizen, in commenting on matters of public concern, against the interest

> of the government, as an employer, in promoting effective and efficient public service . . . On one side of the scale, the Court places the government's presumably weighty interest in workplace effectiveness and efficiency. On the same or other side of the scale, the Court considers whether the speech: (1) impaired discipline by superiors or harmony among co-workers; (2) had a detrimental impact on close working relationships for which personal loyalty and confidence are necessary; (3) impeded the performance of the employee's duties or interfered with the regular operation of the enterprise; and (4) was aired in an inappropriate time, place, or manner. . . . In addition, the Tenth Circuit has assigned non-specific weights to the "truth or falsity" of the speech, . . . and the value of the speech to public discourse.

Westbrook v. Teton County School District No. 1, 918 F. Supp. 1475, 1483-1484 (D. Wyo. 1996) (citations omitted).

In this case, central to the defendants' arguments is the notion that the Board must speak with one voice and that cohesiveness among Board members is essential to the effective functioning of the College's Board of Trustees. They contend plaintiff, as a trustee, failed to loyally adhere to the Board's Code of Ethics one-voice policy and that her conduct undermined effectiveness of the Board. However, the defendants have not directed the Court's attention to any cases discussing such "one voice" policies. In the Court's own research, it appears that it is often desirable for a governmental entity to speak with one voice. Most frequently discussed is the need for the United States government to speak with one voice in matters of foreign commerce. See e.g., *United*

States v. International Business Machines Corp., 517 U.S. 843, 116 S.Ct. 1793, 1799 (1996). Other cases, fewer in number, discuss the need for management to speak with one voice. See e.g., *Brousseau v. United States*, 640 F.2d 1235, 1249 (Ct.Cl. 1981) ("Management cannot function effectively unless it operates "with one voice" vis-a-vis others. Cohesive operation of management is dependent on the loyalty of the inferior management to superior management. This loyalty must be maintained in situations involving management's relations with non-managerial employees. For management to countenance disloyalty in such situations would be for management to render itself impotent."); *Brown v. Department of Transportation, Federal Aviation Administration*, 735 F.2d 543 (Fed. Cir. 1984)(quoting *Brousseau;* applying *Pickering* balancing test); *Stanek v. Department of Transportation*, 805 F.2d 1572, 1579 (Fed. Cir. 1986).

The "one voice" principle has also been discussed and approved in other contexts. *Minnesota State Board for Community Colleges v. Knight*, 104 S.Ct. 1058, (1984)("The state has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions, whatever other advice they may receive on those questions. Permitting selection of the "meet and confer" representatives to be made by the exclusive representative, which has its unique status by virtue of majority support within the bargaining unit, is a rational means of serving that interest." 104 S.Ct. at 1069); *United States v. Yonkers Board of Education*, 902 F.2d 214 (2d Cir. 1990)(As an advisory body to the City, the

Parks Board had opportunity to influence the city's decision making, but lacked a separate existence separate from the City. The appellate court noted, "[w]e think that the city must eventually speak with one voice, and that the City may not engage in the duplicity of consenting to a court order, declining to appeal it, and then authorizing one of its subordinate advisory agencies to appeal the order.)

These cases give credence to the notion that the "one voice" principle is a legitimate interest and one which is viewed as contributing to the effective functioning of a governing body or management. In this instance, the Laramie County Community College Board of Trustees is charged with the responsibility of making decisions that affect the public interest and affecting the administration and management decisions of the College. The Code of Ethics, Policy 1530, is designed to further this interest and assures that the Board speaks with "one voice" with respect to all majority decisions that affect the administration and government of the community college. Further, Wyoming Statute § 21-18-304(a)(i) directs a Community College District Board to prescribe and enforce rules and regulations for its own government and government of the Community College under its jurisdiction.

There is little doubt that most of plaintiff Phelan's statements, made by her as a trustee, which were included in her newspaper advertisement on November 2, 1998, were addressed to matters of public concern. In addition to her statement that enrollment at the College was down 15%, a matter which is disputed in this proceeding, Phelan's advertisement sought to support the

election of Dick Lennox to the LCCC Board of Trustees and encouraged voters to vote "No" on a 5 mill tax. However, Phelan's statements were not made as a purely private citizen speaking on a matter of public concern. By identifying herself as a trustee, the Court is required to determine whether the defendants have borne the burden of proving that the censure of Phelan was justified. Because Phelan's ad addressed matters of public concern, the Supreme Court's *Pickering* analysis requires that we balance Phelan's interests in making her statement against the interests of the Board of Trustees in promoting the efficiency of the public services it performs through the activities and votes of its elected Board members.

In performing this balancing, Phelan's statements may not be considered in a vacuum. *Rankin v. MacPherson*, 107 S.Ct. 28901, 2899 (1987). "The manner, time and place of the expression are relevant, as is the context in which the dispute arose." *Id.* Other pertinent considerations include whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Id.*

The defendants have suggested that Phelan's advertisement, which was placed in the newspaper the day before the general election in which voters would be considering the 5 mill levy proposal, was intended to influence the public to vote against the proposal, using her influence and position as a trustee. The defendants urge this Court to find that the proper forum for a Board

member to express such opinion and to engage in vigorous political debate is that which is available and occurs prior to voting on issues being considered by the Board.

Phelan, without authority and as a Board member, represented to the public that enrollment was down at the College by 15%, when it appears she had no factual basis for making such a claim. She encouraged the public to vote against the proposed 5 mil [sic] tax designed to fund certain projects for the renewal of the Laramie County Community College campus, although, at the very least, Phelan had voted in favor of bringing the matter to the voters for consideration.[1] The day before the election, Phelan, identifying herself as a trustee, purchase [sic] an ad encouraging voters to vote "No" on the 5 mill levy tax. Members of the College's Board of Trustees subsequently voted to censure Phelan for her conduct, relying on the provisions of Policy 1530 of the Code of Ethics for Trustees, requiring, among other

---

[1] It is somewhat unclear whether Phelan contends in this action that she merely voted to put the resolution on the ballot for consideration by the voters in the November election or whether she also voted in favor of the proposed funding method for the proposed projects, i.e., the 5 mill levy, which was to be submitted on the ballot in November. These positions are somewhat incongruous, in that Phelan has an obligation to inform herself, in her capacity as a voting member of the College's Board of Trustees, about all matters upon which she casts a vote. She cannot now claim confusion when it is her responsibility and duty to inform herself, on behalf of her constituency, as to all matters in which she participates as a decision making member of the College's governing Board of Trustees.

things, Board members to uphold and abide by the majority vote of the board.

Phelan has suggested that the *Pickering/Connick* paradigm is not applicable in this case as those cases concerned whether an employee of a public institution or entity could be disciplined by the entity after having spoken about matters touching on the function of the governmental entity. This Court believes that the *Pickering/Connick* paradigm is not so circumscribed. Courts have recognized that the *Pickering/Connick* balancing test employed for analyzing these First Amendment issues may be adjusted when the case does not involve an employee of the government. See e.g., *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 116 S.Ct. 2342 (1996)(finding independent contractors protected from retaliatory governmental action under the First Amendment, just as an employee would be and further finding that the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of the protection); see also *Hanania v. Loren-Maltese*, ___ F. Supp. 2d ___, 1999 WL 342422 (N.D.Ill. 1999)("Resnick [plaintiff] was not an employee but we do not believe that materially changes the analysis", citing *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*).

Given the apparent paucity of case law discussing circumstances substantially similar to those raised in the instant action, the Court has determined that the *Pickering/Connick* analysis is useful in evaluating the parties' various claims and the First Amendment free speech issues. However, the free speech issues, as they have been raised by the parties in their submissions, require this

Court to consider whether the censure challenged by Phelan is deserving of scrutiny beyond that traditionally required for restrictions placed on candidates or office holders.

An instructive case is an Eighth Circuit Court of Appeals case, *Peeper v. Callaway County Ambulance District*, 122 F.3d 619, decided in 1997. In that case, the plaintiff had been elected to a position on the Callaway County Ambulance District Board of Directors in 1996. The plaintiff's husband had worked for the Callaway County Ambulance District as an emergency medical technician and supervisors [sic] for two years at the time of the plaintiff's election to the board. At the time of plaintiff's election to the board, the district and its employees were engaged in discussions over major employment issues, including threatened litigation under the Fair Labor Standards Act for overtime wages, organization of employees for collective bargaining purposes, and matters concerning schedule and hours worked by District Employees. 122 F.3d at 621.

Plaintiff attended her first Board meeting as a member of the Board in April 1996, after the election. At that Board meeting, the Board adopted, over plaintiff's objection, a resolution limiting her participation as a member of the board. The resolution passed, as subsequently amended, provided:

> [I]n order to comply with applicable law and effectively prevent [plaintiff] from using confidential information concerning the District for financial gain, . . . the undersigned Board members desire and do hereby allow [plaintiff] to participate in any District matter except she

may not participate in discussions involving, or vote upon, any of the following:

A. Legal actions, causes of action or litigation between the District and its employees and any confidential or privileged communication between the District or its representatives and its attorneys or legal work product;

B. Hiring, firing, disciplining or promoting of particular employees by the District when personal information about the employee, including information relating to the performance or merit of individual employees, is discussed or recorded;

C. Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

D. Preparation, including any discussions of work product, on behalf of the District or its representatives for negotiations with employee groups;

E. Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, including information relating to medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment; and,

F. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the board may, by majority vote, decide to prevent [plaintiff] from hearing, participating in, or voting upon. . . . [I]n order effort [sic] to comply with applicable law and effectively prevent [plaintiff] from acting in matters that would result in a specific monetary benefit to her or her spouse, that [plaintiff] is directed to recuse

> herself and if she does not recuse herself she is prohibited from hearing, participating in, or voting upon the following:
>
> A. Budgetary items involving the compensation, benefits, and pensions paid to employees;
>
> B. The hiring, promotions, discipline, compensation, benefits, and pensions of employees of the District; and
>
> C. Any other matter implicating the conflict-of-interest concerns of Chapter 105 RSMo which the board may, by majority vote, decide to prevent [plaintiff] from hearing, participating in, or voting upon.

122 F.3d at 621.

As noted, the plaintiff protested the resolution and filed a claim in federal court seeking injunctive relief based on her claim that the resolutions violated her rights under the First and Fourteenth Amendments of the United States Constitution and under the free speech clause of the Missouri Constitution. The district court denied her request, finding the resolution to be "content neutral," narrowly tailored to meet the significant government interests of preventing the appearance of government corruption and promoting the effective functioning of the District, and leaving open alternative channels. The Eighth Circuit reversed, stating that the restrictions in the resolution placed limitations on plaintiff that were not rationally related to the goals of Missouri's conflict-of-interest law and that impinged on her First Amendment associational rights and her Fourteenth Amendment equal protection rights. In its analysis, the circuit court stated:

. . . Our first task is to determine whether the challenged resolution deserves scrutiny that goes beyond that traditionally required for restrictions placed on candidates or officeholders. See *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508 (1981). Where a regulation implicates a fundamental right, such as the First Amendment's free speech guarantee, we review the regulation under heightened scrutiny. *Id.* If no fundamental right is implicated, traditional equal protection principles apply. *Id.* Traditional equal protection principles dictate that state-imposed burdens that affect some citizens differently than others offend equal protection under the Fourteenth Amendment only if such a burden is "wholly irrelevant to the achievement of the [s]tate's [constitutional] objectives." *McGown v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 1004, 6 L.Ed.2d 393 (1961).

The district court examined the May resolution under the First Amendment strict scrutiny standard. [footnote omitted] We disagree that strict scrutiny applies to the limitations at issue. An individual's right to be a candidate for public office under the First and Fourteenth Amendments is nearly identical to one's right to hold that office. Because of the analogous rights involved, we employ the same constitutional test for restrictions on an officeholder as we do on restrictions on candidacy. In reviewing candidacy restrictions, the existence of barriers to a candidate's access to the ballot "does not of itself compel close scrutiny." *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 855, 31 L.Ed.2d 92 (1972). The Supreme Court has upheld restrictions on candidacy that are unrelated to First

Amendment values and that "protect the integrity and reliability of the electoral process itself." . . . To determine whether to uphold restricts on candidacy, we first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" caused by the challenged restriction. . . . Following that evaluation, we must:

> identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

. . .

Following this process, we initially consider the injury caused by restrictions on the office holder. As is the case with restrictions on candidacy, restrictions on an elected official's ability to perform her duties implicate the interests of two district parties: the individual's First Amendment associational rights and Fourteenth Amendment equal protection rights; and the voters' rights to be meaningfully represented by their elected officials. . . . Restrictions on a public official's participation necessarily affect that individual's First Amendment associational rights and Fourteenth Amendment equal protection rights. [footnote omitted] Legitimate state interests may warrant restrictions that are de minimis limitations of the official's participation. . . . Restrictions on an officeholder after election also infringe upon voters' rights to be

represented even more severely than when a state similarly restricts candidacy. [footnote omitted]

Although the district court upheld the May resolution applying the more rigid strict-scrutiny standard, we hold the resolution unconstitutional under national-basis review. The resolution's provisions injure [plaintiff's] First Amendment associational rights and her Fourteenth Amendment equal protection rights. The resolution creates a standard specific to [plaintiff] that treats her differently than other Board members, strongly implicating her Fourteenth Amendment equal protection rights. The restrictions also restrain [plaintiff's] interaction with other Board members, implicating her First Amendment associational rights.

Having determined that the resolution injures [plaintiff's] First and Fourteenth Amendment rights, we evaluate the state's purported interests and whether the restrictions rationally serve those interests. The Board's stated interests are threefold: to prevent the misappropriation of information for personal gain; to prevent the appearance of impropriety; and to promote the free flow of ideas among members of the Board. [footnote omitted] Each of these interests, if served, can at a minimum constitute a reasonable state interest. . . . In this case, however, the portions of the resolution that restrict [plaintiff] from participating in or even hearing discussions not directly related to her husband do not rationally relate to those interests.

The May resolution limits [plaintiff] in a wide range of matters, most of which do not involve the concerns expressed by the Board or

addressed by the conflict-of-interest law. For instance, the May resolution prevents [plaintiff] from participating in discussions of or voting on "[l]egal actions, causes of action or litigation between the District and its employees" without a requirement that the topic be related to [plaintiff's] husband's employment. Likewise, the resolution prevents [plaintiff] from participating in discussions of hiring or firing employees or addressing testing and examination materials without regard to whether [plaintiff's] husband is associated with the matters. The resolution goes well beyond the Missouri conflict-of-interest law's general prohibition of the misuse of confidential information for financial gain and recusal requirement for measures "designed . . . to provide a special monetary benefit" to the official or her spouse.

The Board's concern about keeping its discussions free-flowing, particularly during the Board's closed sessions, is based on its belief that [plaintiff's] presence would chill discussion between other Board members. This chilling, the Board contends, stems from the other Board members' opinion that if [plaintiff] is present she might pass on confidential information to her husband who would, in turn, pass it on to his co-workers. It is incongruous, however, for a state to allow the election of people with such relationships to public office and then consider them less-trustworthy stewards of confidential information merely because of these relationships. The Missouri conflict-of-interest law prohibits any public official from misusing confidential information or acting for self-benefit, and those with spouses employed by the public bodies they serve perhaps face greater

> temptations to run afoul of that prohibition. One does not, however, fact any additional temptation where the matters are unrelated to the official's spouse. Yet the May resolution prohibits [plaintiff] from participating in any matter dealing with any employee's records, any testing material, or the hiring or firing of any employee. The Board's interest in preventing corruption or at least the appearance of corruption is not served by the vast portions of the May resolution that go beyond matters that could lead or appear to lead to corrupt behavior by [plaintiff]. As such, those portions of the May resolution are not rationally related to the state interests cited by the board.
>
> Because provisions of the May resolution infringe upon [plaintiff's] constitutional rights under the First and Fourteenth Amendments without being rationally related to a legitimate state interest, the May resolution cannot stand as written.

122 F.3d at 622-624 (most citations and footnotes omitted). See also *Rash-Aldridge v. Ramirez*, 96 F.3d 117 (5th Cir. 1996).

In this case, the Court finds that one-voice majority rule embodied in Policy 1530 is rationally related to the interests asserted by the defendants in support of the policy and offered to justify the censure of plaintiff in this case. The defendants contend that the one-voice policy minimizes disharmony among Board members once a collective decision by the Board has been made, encourages vigorous debate prior to Board action on matters then under consideration, promotes the efficient functioning and good working relationships among the members

of the Board of Trustees for Laramie County Community College, and produces an atmosphere of trust and encourages communications to accomplish the institution's goals. Phelan's advertisement, placed on the day before the election on the proposed 5 mill levy which was intended to finance the campus renewal plan, taken out in her name, as a trustee, undermined the majority, and unanimous, position of the Board.

The Court is persuaded that the restriction on plaintiff Phelan's speech, as a trustee, that occurs pursuant to Policy 1530 rationally serves the interests of the Board recited above. Furthermore, it does not appear that Policy 1530 was a policy specifically designed to treat plaintiff Phelan differently from any other Board member. The Policy is limited in its scope and does not restrain in any manner her interactions with other Board members prior to voting on any intended Board action. Phelan's capacity as an elected official was not compromised because the Board did not try to remove her from her position on the Board nor did it attempt to take away any of the privileges of that office because of what she said or what she did.

Employing the *Pickering/Connick* balancing analysis, the same result obtains. Phelan's First Amendment rights must be weighted against those of the Board of Trustees. Speech on matters of public concern is protected if the speaker's interest in the expression outweighs the interest of the governmental entity in promoting the efficiency of the public services it performs. Factors that may be considered include whether the statement creates problems in maintaining discipline and harmony among Board members, whether the relationship is one in which

personal loyalty and confidence are necessary, the time, place, and manner of the speech, the underlying context in which the dispute arose, whether the matter was one on which debate was vital to informed decision making and whether the speaker should be regarded as a member of the general public. See also *Jefferson v. Ambroz*, 90 F.3d 1291, 1297 (7th Cir. 1996), citing *Connick*, 461 U.S. at 142, 103 S.Ct. at 1687 (probation officer terminated by employer because employer felt plaintiff's actions made it impossible for probation office to operate effectively with that probation officer still on board, employer's interest in efficient operation of probation department, including need for cooperation with other agencies, far outweighed probation officer's interest in speech.)

Although the *Pickering/Connick* balancing is difficult, the Court finds that the factors weigh on the side of the Board in this case. The Board has expressed in its properly promulgated policies the desire that the Board, once a decision is made after engaging in appropriate debate and discussion, operate with "one voice" vis-a-vis others. The Board seeks to present a united front to voters on issues that must be voted upon, including proposals such as the 5 mill levy proposal. The policy is content neutral and applies to all trustees equally after the Board has reached collective agreement on any proposed course of action. Phelan's advertisement, as a trustee, undermined the likelihood that the proposal would be approved by the voters. Cohesive operation of the Board depends upon effective communication by and between Board members. Loyalty and confidence are also important in the balancing analysis. The Policy preserves solidarity of the Board, particularly with respect to matters the Board

presents to the voting public for consideration. Phelan's statements, as a trustee, potentially caused damage to the Board's effort to approve the 5 mill levy funding proposal.

With respect to the claims asserted by Phelan against Dr. Bohlen, the Court finds that her claims are entirely without merit. The substance is plaintiff's claims against the College president are that he did not object or take other steps to prevent the Board from censuring Phelan for violating the Board's Code of Ethics. As Dr. Bohlen testified in his deposition, he viewed this matter as one internal to the Board and not one which could be considered as affecting and concerning the administration of the community college. This Court agrees. Dr. Bohlen was not an elected, voting member of the Board of Trustees for the College. In his capacity as president of the College, he is charged with administration of the College. He does not have the ability, in that capacity, to manage affairs internal to the Board of Trustees. Plaintiff's assertion that Dr. Bohlen became a conspirator to deprive her of her constitutional rights by failing to object to the Board's proposed censure of her does not withstand scrutiny. See generally *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10th Cir. 1998).[2]

---

[2] In the cited case, plaintiff claimed that the reason the University handled his case the way it did and the reason he was ultimately dismissed was because of his outspoken political conservatism and because he supported an unpopular candidate during a divisive dean search at the Law School. "By raising the spector of a conspiracy, he attempts to avoid a grant of qualified immunity to the individual defendants." The appellate court determined plaintiff had not properly pled a

A few further comments are in order. Plaintiff has alleged that the alleged censure pursuant to the Board's policy had a chilling effect on the exercise of her constitutional rights. In any action attacking action on First Amendment free speech grounds, allegations of subjective chill are inadequate. The plaintiff must prove she was actually chilled in the exercise of her right. *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S.Ct. 2318-2325-26 (1972), reh. denied, 409 U.S. 901, 93 S.Ct. 94 (1972), quoted in *Mazza v. Hendrick Hudson Central School District*, 942 F. Supp. 187, 192 (S.D.N.Y. 1996).

Plaintiff Phelan knew of the Board's "one voice" policy and voted many times in favor of Policy 1530. Notwithstanding that knowledge, she published her advertisement the day before the election on the 5 mill

---

claim that the individual defendants acted in concert to deprive him of his constitutional rights. "Allegations of conspiracy may, indeed, form the basis of a § 1983 claim[,]" citing *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir.1994). "However, a plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants. . . . " "Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim." *Id.* "Professor Tonkovich presents us with nothing more than conclusory allegations. We do not think it is reasonable to infer, for example, that because certain Law School faculty members met with certain administrators during the investigation, they were conspiring with one another and with the Hearing Committee who ultimately found against Professor Tonkovich. Furthermore, there is no indication that the Hearing Committee members or the Regents were even aware of the divisive dean search or of the candidate whom Professor Tonkovich supported. Professor Tonkovich has simply failed to carry his burden of alleging the facts necessary to support his claim of conspiracy on qualified immunity.")

levy proposal, identifying herself as a trustee. Her speech was not chilled or otherwise deterred because of the purported unconstitutional policy. Her argument that her free expression of speech has been chilled has no factual basis and her claim of chill does not withstand summary judgment.

Defendants have also asserted that they are entitled qualified immunity in their individual capacities. A public official is entitled to qualified immunity from a § 1983 action insofar as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Clanton v. Cooper*, 129 F.3d 1147, 1153-54 (10th Cir. 1997). The specific actions of the defendants that are at issue in this case have not been shown to violate the law. However, in view of the discussions in the preceding portions of this opinion, the Court believes it is entirely reasonable to conclude that the law regarding the conduct in question, the validity of Policy 1530 and the censure of Phelan based upon said policy, is not clearly established. While the right to speak out on political and social issues is clearly established with respect to a private individual, in the context arising in this case, the maverick trustee's right to speak out is more circumscribed. The contours of the plaintiff's right to speak out, as a trustee, must be sufficiently clear that a reasonable trustee would know that the specific action, i.e., the censure, was in violation of that right. Such a conclusion cannot be reached in this case. Accordingly, although not necessary in view of the foregoing disposition, the Court believes that the defendants should be entitled to enjoy qualified immunity from liability in this case.

The Court finds that Pehlan's Section 1983 claim asserting that Policy 1530, and the censure of her by the Board of Trustees, are a violation of her constitutional First and Fourteenth Amendment rights to be without merit. To the extent that plaintiff's claims, including her claim that the censure constitutes an unlawful bill of attainder, are not addressed with specificity in this order, summary judgment is likewise granted in favor of defendants. Because there are no genuine issues of material fact in dispute, the Court further finds and concludes that the defendants are entitled to summary judgment in their favor on all claims.

Accordingly, it is therefore

ORDERED that the defendants' motion for summary judgment shall be, and, is, **GRANTED**.

Judgment shall be entered in favor of defendants forthwith on all claims asserted against them by plaintiff.

Dated this 25th day of October, 1999.

/s/ Alan Johnson
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 11 2001
CLERK

No. 00-1421

In The

Supreme Court of the United States

ELIZABETH PHELAN,

Petitioner,

v.

THE LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, DOCTOR CHARLES BOHLEN, CHERYL W. PORTER, JOHN R. KAISER, LARRY ATWELL, DONALD J. BROWN, TOM BAUMAN, and JEAN VONDRAK BROWN, in their individual capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

HENRY F. BAILEY, JR.
Counsel of Record
BAILEY, STOCK & HARMON P.C.
221 East 21st Street
P.O. Box 1557
Cheyenne, WY 82003-1557
(307) 638-7745

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENTS' BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

The question presented by Petitioner's Writ is whether the First Amendment permits, as a part of robust debate, the application of a Code of Ethics to punish an elected member of a college Board of Trustees for speaking against the Board's unanimous view, if such punishment carries no specific collateral injury other than damage to reputation.

The question as presented and phrased is predicated on both a false assumption of fact and an improper interpretation of the Tenth Circuit's ruling based on that assumed fact. Contrary to Petitioner's assertion, nothing in the record establishes Petitioner suffered any injury to her "reputation" as a result of the Board's public censure. Indeed, nothing in the record establishes the Board punished or intended to punish the Petitioner. The Tenth Circuit held that the Board's censure did not trigger First Amendment scrutiny because it did not punish Ms. Phelan for exercising her free speech nor did the censure deter her future speech. *Phelan v. Laramie County Community College Board of Trustees, et al.*, 235 F.3d 1243, 1246 (10th Cir. 2000). The record demonstrates that notwithstanding the Board's censure, or in other words their public statement of displeasure with Petitioner's conduct, which went far beyond simply uttering a view contrary to the unanimous vote, the Board did absolutely nothing to chill the Petitioner's First Amendment rights. Indeed, the record discloses and the Tenth Circuit appropriately noted, "Ms. Phelan has explicitly stated she would

engage in the same actions under similar circumstances in the future." *Id.* at 1247.

Because no one's First Amendment rights were abridged in this case, because Petitioner freely, openly and robustly engaged in public debate on the issues she chose to debate, and because no harm of any kind attended the Board's public statement of displeasure with Petitioner's conduct, this case does not, as Petitioner contends, present "a question of major consequence to the freedom of elected representative officials to publicly dissent from the majority." Thus, the Tenth Circuit's Ruling was proper in all respects and Respondents therefore respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

NEITHER THE RECORD NOR THE TENTH CIRCUIT'S DECISION BELOW RAISE A QUESTION OF MERIT FOR THIS COURT'S CONSIDERATION

The salient and undisputed facts of this case are these. Faced with significant repair and renovation needs, the Laramie County Community College Board of Trustees had debated for many months how to finance a campus renewal plan. Finally, on August 19, 1998, the Board, *including Petitioner Phelan,* voted unanimously to present a 5 mill tax assessment to the public for a popular vote. Then, on November 2, 1998, *the day before the vote,* Petitioner Phelan took out an ad in a local newspaper opposing the mill levy. Frustrated by Petitioner's eleventh hour campaign against what she herself had supported until the eleventh hour, the Board voted to censure Petitioner on December 16, 2000 and *asked* her not

to engage in such conduct again. Ms. Phelan was not removed from the Board, nor was she denied any benefits of Board membership. Thereafter, Ms. Phelan filed her lawsuit.

The principal fallacy of Petitioner's Writ is found in Petitioner's representation that she suffered damage to reputation which had a chilling or suppressing effect on her First Amendment right of free speech.

First, the record does not demonstrate any injury whatsoever to Petitioner's reputation, which was that of a "maverick" trustee, nor does the record demonstrate that the Board's censure of the Petitioner had any chilling or suppressing effect on her speech.

> The Board simply made a statement about Ms. Phelan's failure to follow an ethics policy that she voted for on at least three occasions. She remained free to express her views publicly and to criticize the ethics policy and the Board's censure. In fact, Ms. Phelan has explicitly stated she would engage in the same actions under similar circumstances in the future. *Phelan v. Laramie County Community College Board of Trustees, et al.*, 235 F.3d 1243, 1247 (10th Cir. 2000).

Beyond that, even if we assume *arguendo* that Petitioner suffered some damage to her reputation, which is not borne out by the record, Petitioner's First Amendment claim must still fail, since Petitioner's "alleged harm to her reputation" is not enough to establish an abridgement of her First Amendment rights. *Meese v. Keene*, 481 U.S. 465, 472-477 (1987); *New York Times Company v. Sullivan*, 376 U.S. 254, 270, 279-80 (1964).

The irony of this case is that the Petitioner, an elected member of the Board of Trustees of Laramie County Community College, now actively opposing an ethics policy which she herself voted for on three separate occasions, in the name of freedom of expression, filed suit against her fellow Board members and the College *simply* because of a public *statement* of displeasure and nothing more. In other words, Petitioner's suit charges a violation of her right to free speech by the Board's exercise of its own right to free speech; a Constitutionally self-defeating paradox that the Tenth Circuit handled appropriately by affirming the District Court's Summary Judgment.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request this Honorable Court deny the Petition.

Respectfully Submitted,

HENRY F. BAILEY, JR.
BAILEY, STOCK & HARMON P.C.
221 East 21st Street
P.O. Box 1557
Cheyenne, WY 82003-1557
(307) 638-7745

(3)

No. 00-1421

Supreme Court, U.S.
FILED
APR 24 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ELIZABETH PHELAN,

Petitioner,

v.

THE LARAMIE COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, DOCTOR CHARLES BOHLEN, CHERYL W. PORTER, JOHN R. KAISER, LARRY ATWELL, DONALD J. BROWN, TOM BAUMAN, and JEAN VONDRAK BROWN, in their individual capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

BERNARD Q. PHELAN
Attorney at Law
2206 Pioneer Ave.
P. O. Box 1841
Cheyenne, WY 82003-1841
(307) 634-8085

Counsel of Record
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

9 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT 1

THIS COURT SHOULD CONSIDER WHETHER THE LOWER COURT PROPERLY EXTENDED *LAIRD* AND *NEW YORK TIMES CO.* TO APPROVE THE USE OF A CODE OF ETHICS TO REGULATE PROTECTED SPEECH 2

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES:

Ex parte Levitt, 302 U.S. 633 (1937) 5

Laird v. Tatum, 408 U.S. 1 (1973) 1, 2, 3, 4, 5, 6

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 1, 2, 4, 6

Phelan v. Laramie County Community College, 235 F.3d 1243 (2000) 1, 2

OTHER AUTHORITIES:

50 Am.Jur.2d, *Libel and Slander*, § 137, pp. 431-432 4

Black's Law Dictionary, Revised Fourth Edition (1968) 3

H.R. Rep. No. 27, 90th Cong., 1st Session (1969) 4

Black's Law Dictionary, Seventh Edition (1999) 4

Rules of the Committee on Standards of Official Conduct 4

Senate Report No. 83-2508, November 8, 1954 4

S. Res. 338, 88th Congress, Second Session, (1964), as amended 4

Laramie County Community College Board of Trustees Code of Ethics, Section 1530 5

PETITIONER'S REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT.

Respondents argue that the Tenth Circuit's decision was correct when it said that the Board's censure did not abridge free speech because it "did not punish" Mrs. Phelan for exercising her free speech, nor did it deter future protected speech. However, a reading of the principle cases relied upon by the Tenth Circuit shows that the lower court extended this Court's decisions in *Laird v. Tatum*, 408 U.S. 1 (1973), and *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), far beyond the specific holdings of those cases, allowing protected speech to be punished in the interest of maintaining the appearance of political unity. This Court should grant certiorari to close this gaping loophole in First Amendment jurisprudence.

In determining whether the respondent's public censure for unethical conduct constituted sufficient punishment to trigger First Amendment scrutiny, the Tenth Circuit interpreted the holding in *Laird, supra,* to mean that, in light of *New York Times Co., supra,* there must be some imposition of "specific collateral injury" beyond a public censure before free speech was infringed. *Phelan v. Laramie County Community College*, 235 F.3d 1243, 1248 (2000). Though the *Laird* case did not involve a written code of conduct which, as applied, prohibited an elected official from expressing protected political speech, the Tenth Circuit read the language and cases cited in *Laird* to mean that there must be a compulsory government regulation or proscription which threatens "specific collateral injury," beyond being "censured" for ethical lapse before

First Amendment scrutiny is triggered since, under *New York Times Co. v. Sullivan, supra,* damage to reputation is to be tolerated by a public official. *Phelan, supra,* p. 1248. This is an extrapolated interpretation of *Laird* and *New York Times Co.* which operates to allow a code of ethics to regulate and suppress protected speech and demonstrates the reason why this Court should grant the Petition for Certiorari. To clarify whether a code of ethics, enforced through public censure, may be used to suppress protected political speech, this Court should issue a Writ of Certiorari to the Tenth Circuit Court of Appeals.

THIS COURT SHOULD CONSIDER WHETHER THE LOWER COURT PROPERLY EXTENDED *LAIRD* AND *NEW YORK TIMES CO.* TO APPROVE THE USE OF A CODE OF ETHICS TO REGULATE PROTECTED SPEECH.

The lower court's decision interprets the holding in *Laird* and *New York Times Co., supra,* to mean that unless a government sanction carries a specific collateral injury, such as loss of a job or profession, a punishment for exercising free speech does not infringe free speech. *Phelan, supra,* p. 1248. This interpretation does not square with the facts and holding in *Laird,* nor does it conform to the actual record in this case which demonstrates respondents' clear intent to suppress and deter political dissent through imposition of public censure.

At the outset, the facts in *Laird* are not remotely similar to the facts in *Phelan*. The *Laird* case dealt with a Department of Army surveillance program instituted to

obtain information on civil disturbances to aid in its role in quelling insurrection. *Laird, supra,* 408 U.S. at 2-5. This Court held in *Laird* that such a program did not chill the exercise of free speech by its mere existence. Since nothing in the existence of the intelligence gathering program carried any specific, present, objective harm, or threat of specific future harm, a federal court could not exercise its jurisdiction to regulate the activities of the Army since the surveillance program did not have regulatory, prescriptive or compulsory characteristics. *Laird, supra,* 408 U.S. at 13-15.

In contrast to the facts in *Laird,* in this case there is a regulatory Code of Ethics which, as applied, prohibits an elected member of a governing board of trustees from expressing political views contrary to the majority under pain of public "censure" for conduct contrary to the Code of Ethics. Thus, existence of a regulatory, prescriptive and compulsory governmental code of conduct, absent in *Laird,* is clearly present here.

Also, in stark contrast to *Laird,* in this case there was a specific direct injury imposed as a result of petitioner's speech. Though the Board's punitive sanction for violation of the Code did not contemplate loss or denial of employment or professional licensure, the sanction of public censure nonetheless was real, specific and harmful and should trigger First Amendment scrutiny. It is clear that a statement designated a "censure" is, *per se,* a punishment. An older edition of *Black's Law Dictionary* defined "censure" to mean, "A spiritual punishment." *Black's Law Dictionary,* Revised Fourth Edition (1968). The current edition defines the noun "censure" to be, "An official reprimand or condemnation; harsh criticism;" and

the verb "censure" as, "To reprimand; criticize harshly." *Black's Law Dictionary*, Seventh Edition (1999). Indeed, censure has long been deemed appropriate punishment of an elected official for ethical lapse.[1] Both the United States Senate and the United States House of Representatives specify "censure" to be potential punishment, just short of expulsion, for violation of the codes of conduct established by each chamber. (See S. Res. 338, 88th Cong., 2d Session (1964) as amended, Section 2(a)(2)(B)(i); and Rule 25(e)(2) of the *Rules of the Committee on Standards of Official Conduct*, adopted under authority of clause 2(a)(i) of Rule XI of the *Rules of the House of Representatives*, 107th Congress, March 14, 2001).

Words calculated to impose stigma upon a person's reputation for lapse in moral conduct have always been deemed harmful without proof of special harm. See 50 Am.Jur.2d, *Libel and Slander*, § 137, pp. 431-432. Even under *New York Times Co. v. Sullivan*, a sanction which imposes public censure calculated to label a public official as having want of integrity in discharge of duties of office, is no less a "specific collateral injury," deemed by the Court of Appeals to be absent in this case, than were the terminations or denials of employment or professional licensure set forth in *Laird* as examples of where individuals were subject to governmental regulation, proscriptions or compulsions which give rise to jurisdictional

---

[1] Senator Joe McCarthy was "censured" in 1954. *Report of the Select Committee to Study Censure Charges Re Senator McCarthy of Wisconsin*, Senate Report No. 83-2508, November 8, 1954. Representative Adam Clayton Powell was "censured" for misconduct in 1969. H.R. Rep. No. 27, 90th Cong., 1st Session (1969).

standing to seek First Amendment review by the judiciary. See *Laird, supra,* 408 U.S. at p. 13, citing *Ex parte Levitt,* 302 U.S. 633, 634 (1937).

Moreover, the record in this case clearly demonstrates that the intent of the respondents in applying the Code of Ethics was to punish petitioner for her exercise of political speech to maintain the appearance of unified political opinion under the so-called "one voice" policy expressed in Section 1530 of the Code of Ethics. Dr. Bohlen, the College President, understood "good board practice" to be that once a decision is made by a majority of a seven-member board, dissenting members are obligated to refrain from publicly expressing an opinion contrary to the majority. (Aplt's 10th Cir. App., pp. 60-67.) Mr. Bauman testified that petitioner violated the ethics policy by publishing her ad opposing the tax increase. (Aplt's 10th Cir. App., p. 73.) Ms. Porter testified that, "Once the Board has voted on a question, it's very important that you speak as one." (Aplt's 10th Cir. App., p. 82.) Mr. Atwell testified that a board member agrees to give up her right to publicly oppose an action of the board once elected, or face censure. (Aplt's 10th Cir. App., p. 92.) Mr. Don Brown stated, under oath, that board members have to keep their misgivings to themselves, (Aplt's 10th Cir. App., pp. 96-97); while Ms. Jean Brown said that even if a member had personal problems with a majority decision, a Board member must publicly support it under the Code of Ethics. (Aplt's 10th Cir. App., p. 101.) Mr. Kaiser forthrightly testified that a trustee is prohibited from publicly stating she had changed her mind to oppose the tax increase, and that the Code of Ethics

lawfully "abridged" a trustee's right of free speech. (Aplt's 10th Cir. App., pp. 112 and 114.)

CONCLUSION

This matter involves a written code of conduct which, as applied, prohibits an elected official from exercising protected political speech under threat of public "censure" for violation of the Code of Ethics. Yet, because the sanction imposed was merely a public statement condemning petitioner for violating a code of ethics, implying a want of integrity, the Court of Appeals, citing *Laird, supra,* held that petitioner's right of free speech was not infringed because there was no "specific collateral injury" since damage to reputation is supposedly tolerated under *New York Times Co. v. Sullivan, supra.* To clarify whether *Laird* and *New York Times Co.* should be so interpreted to allow the application of a Code of Ethics to punish protected speech because such punishment merely stigmatizes the speaker's reputation, this Court should grant the Petition for Certiorari.

DATED this 23rd day of April, 2001.

Respectfully submitted,

BERNARD Q. PHELAN
Attorney for Petitioner
2206 Pioneer Ave.
P.O. Box 1841
Cheyenne, WY 82003-1841
(307) 634-8085